Filed 5/11/15 P. v. Prescott CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EARNEST L. PRESCOTT, Defendant and Appellant.	A135991 (Alameda County Super. Ct. No.165685) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed herein on April 14, 2015, be modified as follows:

1. On page 2, in the second full paragraph, the second sentence beginning, "While in Acorn territory" is deleted and replaced by the following sentence:

> "Williams testified that while they were in Acorn territory, Jones said he saw a man he thought was 'Birdman,' who had knocked out his tooth while they were in jail. Both Officer Valle and Williams testified they knew Dionte Houff went by the name 'Birdman,' and that he was associated with Acorn."

2. On page 9, in the first full paragraph, the last sentence beginning, "That man" is deleted and replaced by the following sentence:

> "The man defendant shot and killed turned out to be Johnson, not Houff. As Williams told police, 'whoever they was looking for, they couldn't see

nobody right there. So, basically, they just got on whoever was over there. . . ."

3. On page 7, at the end of the second to last sentence of the first full paragraph, the following footnote is added:

"Defendant claims the factors on which Officer Valle based his opinion that he was affiliated with P Team provided no "basis in reason from which to infer that [he] was a gang member." Any error in admission of this testimony was invited, because it was defendant's counsel who first elicited the testimony that defendant was "affiliated" with P Team on cross-examination of Officer Valle. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) And, Officer Valle did not testify defendant was a gang member, only that he was "affiliated with P Team gang." He explained "some individuals . . . are not necessarily gang members, but may be affiliated to a gang for a few different reasons . . . includ[ing] friendships," and agreed that individuals who are simply associated with a gang "are not committing crimes for the benefit of the gang." Moreover, as the court in *People v. Valdez* (1997) 58 Cal.App.4th 494, explained, "The court properly permitted testimony concerning the criteria to explain the basis for [the police officer's] opinion concerning gang affiliation. Challenging the reliability of these criteria and the manner in which they are applied are, and in fact were here, matters for cross-examination." (*Id*. at p. 507, fn. 11.)

4. On page 11, footnote 5 is modified to read in full:

"Defendant also claims admission of this evidence denied him his due process rights, necessitating review under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.) "[T]he admission of evidence results in a due process violation only if it renders the trial fundamentally unfair." (*People v. Cowan* (2010) 50 Cal.4th 401, 463–464.) " 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." ' [Citations.]" (*People v. Albarran, supra,* 149 Cal.App.4th at p. 229.) Because we have concluded there were permissible inferences the jury could draw from the gang evidence, its admission did not render the trial fundamentally unfair or violate due process. As in *People v. Valdez* (2012) 55 Cal.4th 82, "[d]efendant argues the prosecution's use of the challenged gang-related evidence violated not only his statutory rights, but also his constitutional rights to due process, a fair trial, and a reliable determination of guilt and penalty. . . . Because there was no statutory error, his constitutional claims . . . fail." (*Id.* at p. 134.)"

There is no change in the judgment.

The petition for rehearing of appellant Earnest L. Prescott is denied.

Dated:

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Humes, P. J.

Filed 4/14/15 P. v. Prescott CA1/1 (unmodified version)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EARNEST LEE PRESCOTT, Defendant and Appellant.	A135991 (Alameda County Super. Ct. No. C165685A)

INTRODUCTION

Defendant Earnest Lee Prescott appeals from his conviction of murder. He maintains the court erred in admitting "gang evidence" and in excluding evidence attacking the credibility of a witness. He also claims because he was 16 years old at the time of his crime his sentence of two consecutive 25-years-to-life terms violates the proscriptions against cruel and unusual punishment in the United States and California Constitutions. We conclude the court did not err in its evidentiary rulings. We agree, however, that defendant's sentence is in effect the functional equivalent of life imprisonment without possibility of parole, and deprives him of a meaningful opportunity for parole in violation of the Eighth Amendment. We therefore remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On June 6, 2010, James Johnson was shot and killed as he walked from his home to the store. He lived in the Acorn housing complex in west Oakland, an area which was the territory of the "Acorn" gang.

On the day of the shooting, defendant, then 16 years old, was in a car heading over to Sycamore Street in west Oakland, part of the turf of the "Ghost Town" gang. Armond Turner was driving, and defendant was in the front seat with Laquisha Williams. Williams was a crack dealer who at one time headed the "Q Team," which was allied with the "P Team." Both "teams" were subsets of the Ghost Town gang. Jason Jones, known as "2-9" and an individual called "Duder," both of whom were affiliated with P Team, as well as "three or four girls" were also in the car, which belonged to Williams's sister. Defendant was also affiliated with P Team.

Williams wanted to buy some marijuana, so the group headed toward an Oakland neighborhood known as "Lower Bottoms," driving though the territory of the rival Acorn gang. While in Acorn territory, Jones saw a man he thought was Dionte Houff, or "Birdman," an Acorn gang member who had knocked out Jones's tooth in prison. Jones and defendant convinced Turner, the driver, to turn the car around anyway.

Turner made a U-turn, drove back and parked in a lot by a housing unit known as "Mohr 1." Defendant and Jones got out of the car and entered the housing complex. They did not see Houff, but saw Johnson, who was walking from his home at the Acorn housing unit toward Green Valley Foods. Defendant fired multiple shots at Johnson, who fell to the ground. Johnson died from massive hemorrhaging due to multiple gunshot wounds.

After defendant and Jones left the car but before the shooting, Williams sent Duder to find out why the two were taking so much time in rival gang territory. She testified if an individual is from Ghost Town, it would be dangerous to be in Acorn. Williams then heard seven or eight shots fired, and defendant, Duder and Jones came running back to the car. Williams told police that when defendant got in the car, he had a silver and black gun, but at trial she testified she did not remember seeing a gun. Williams told police defendant told her Jones "wanted to shoot" but defendant "ran up on the dude." At trial, Williams testified what she told police was "[n]ot really" true.

At the time of the shooting, Mignon Perry was at her mother's home in the Mohr 1 unit, directly across from Johnson's home. Perry supported "Gas Team," a subset of the

Acorn gang. She knew Johnson well, and thought of him as a relative. From her kitchen window, she saw Johnson headed toward the Green Valley store, which she knew was his "everyday routine." She had just opened the front door to ask him to pick something up for her when she heard multiple gunshots and Johnson shouting he had been shot.

Perry's mother slammed the front door shut, and through the window, Perry saw the shooter with a semiautomatic gun in his hand. The shooter pointed his gun at Johnson, moved closer, and aimed. After the shooting stopped, she opened the door and stepped outside, where she saw Johnson on the ground and the shooter running away. The shooter turned around when Perry swore at him, giving her the opportunity to see "the front of him," and make eye contact with him. Perry saw no one else around. Perry stayed with Johnson, who was still alive but could not speak, until police arrived.

Perry described the shooter to police as an African-American male between the ages of 16 and 18 years old, 6 feet and 1 inch tall, wearing a white T-shirt and blue jeans and carrying a silver handgun. She would not provide a written statement at the time because the crowd that had gathered told her not to say anything to police. She later learned from "[p]eople from the neighborhood" that Williams, Turner and defendant may have been involved in the shooting. Perry was acquainted with Williams and Turner. She logged on to Williams's MySpace page, where she saw a photograph of Williams with Turner and defendant, and recognized defendant as the shooter.

In an interview with police, Perry identified defendant in the MySpace photo as the shooter. Police also showed her still photos from surveillance videos taken at Mohr 1, in which she was able to identify defendant, Williams, and Williams's car. The surveillance videos show a man identified as defendant leaving Williams's car first and heading into the housing complex, followed by a second man. About two minutes later, a youth got out of Williams's car and ran in the direction defendant and Jones had gone. Within 30 seconds, all three of them returned to the car, got in, and drove away.

The day before the shooting, Williams hosted a memorial barbecue for Anthony Dailey, known as "Active," a Ghost Town gang member killed in 2007. She had T-shirts made with Dailey's picture on them for the event. Defendant, Jones and Dailey were

close, and defendant was wearing one of the memorial T-shirts on the day of the shooting.

Two days after the shooting, police arrested defendant and Williams for the murder. Ultimately, defendant and Jones were charged with murder.[1] (Pen. Code, § 187, subd. (a).) The amended information further alleged defendant personally and intentionally discharged a firearm causing great bodily injury and death. (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subds. (b) & (d), 12022.7, subd. (a).)

Police found the gun used to kill Johnson a few weeks later, in the course of investigating another shooting. Police discovered defendant was a contact in the cell phone of the individual from whom the gun was recovered.

A few months after his arrest, defendant escaped from the juvenile facility where he was being held for trial. In his cell, law enforcement found two handwritten letters addressed to "Dear Lord" in which he admitted "taking a human being life," and asked for forgiveness and a not guilty verdict.

A jury found defendant guilty of murder and discharging a firearm causing death. The court sentenced defendant to an aggregate term of 50 years to life, consisting of two consecutive terms of 25 years to life, one for the murder and one for the firearm enhancement.

DISCUSSION

Admission of Gang Evidence

Defendant maintains the court erred in admitting the testimony of Oakland Police Officer Steve Valle as an expert on the structure and activities of West Oakland gangs. Valle testified regarding West Oakland gangs, the rivalry between Acorn and Ghost Town gangs, common forms of gang retaliation, and identified the gangs with which defendant and other involved individuals were affiliated. Defendant claims the evidence was not relevant because the prosecution "fail[ed] to prove that [defendant] was a member of the P-Team gang or had committed any past violent criminal acts in affiliation

[1] Defendant and Jones were tried together, but Jones was acquitted.

with or for the benefit of that gang . . . ." He also asserts the court erred in denying his motion to exclude the evidence under Evidence Code section 352.[2] We review the court's rulings "regarding relevancy and . . . section 352 . . . under an abuse of discretion standard." (*People v. Lee* (2011) 51 Cal.4th 620, 643 (*Lee*).)

"Evidence of the defendant's gang membership, when not directly relevant to prove an element of the offense or an enhancement . . . is, like evidence of prior crimes, subject to both Evidence Code section 1101, subdivision (b) and 352." (Simons, Cal. Evidence Manual. § 1:31.) Section 1101 prohibits admission of evidence of a "person's character . . . whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct . . . when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a).) "In general, '[t]he People are entitled to "introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent." [Citation.]' [Citation.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.) Thus, gang evidence may be admissible "if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Defendant maintains that in cases such as this, in which there is no substantive gang charge or street gang enhancement, gang evidence is only admissible when the defendant has "proven gang ties that made the evidence relevant to a material issue." He relies on three cases: *Lee, supra*, 51 Cal.4th 620 (*Lee*); *People v. Jordan* (2003) 108 Cal.App.4th 349 (*Jordan*); and *People v. Ruiz* (1998) 62 Cal.App.4th 234 (*Ruiz*), none of which support his claims.

In *Lee*, the defendant was convicted of first degree murder after shooting the victim "with seven shots to her face at close range," with the special circumstance of attempted rape. (*Lee, supra*, 51 Cal.4th at pp. 623, 643.) The prosecutor conceded there was no evidence the murder was gang-related, and agreed not to present evidence of the defendant's gang membership. (*Id.* at p. 642.) The prosecutor instead sought to

[2] All further statutory references are to the Evidence Code unless otherwise indicated.

introduce evidence of the defendant's nickname, "Point Blank," to show identity and intent. (*Ibid*.) The evidence showed defendant introduced himself as "Point Blank," and after the murder was asked " '[I]s that why they call you Point Blank?' " to which he did not respond. (*Ibid*.) On appeal, the court held evidence of the nickname was relevant to identity but cumulative of other evidence, and thus had minimal probative value in that regard. (*Id.* at p. 643.) The nickname, however, was relevant and "extremely probative with regard to the intent," and thus admissible. (*Ibid*.)

In *Jordan*, the defendant was charged with possession for sale of cocaine base, which was found in a stairwell where he had been sitting. (*Jordan*, *supra*, 108 Cal.App.4th at pp. 353–354.) The trial court initially excluded evidence of his gang membership, but allowed it on rebuttal after the defense presented evidence "indicating gang members sold drugs in the area of the apartment complex" where the defendant was apprehended. (*Id*. at pp. 365–366.) The court held "[t]he prosecutor was entitled to rebut the inference, created by [the] defense, that the drugs found in the stairwell belonged to one of the gang members, not [defendant]." (*Ibid*.)

In *Ruiz*, the defendant was convicted of the sale of rock cocaine. (*Ruiz*, *supra*, 62 Cal.App.4th at p. 236.) His defense was alibi. In addition to several family members testifying he was at his mother's house at the time of the drug sale to an undercover officer, a man who shared a cell with the defendant but claimed not to know him stated he was the dealer who had sold drugs to the undercover officer. (*Id*. at p. 237.) In rebuttal, the prosecutor presented expert gang testimony that the man and defendant were both members of the same small gang, and thus "it was impossible for [them] not to know each other." (*Id*. at p. 238.)

Contrary to defendant's claim, the California Supreme Court has explained that neither a substantive gang charge nor a street gang enhancement is a prerequisite for admission of gang affiliation to show motive or intent. "In cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] *But evidence of gang membership is often relevant* to, and admissible regarding, the charged offense.

Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, firs italics omitted, second italics added.)

The court admitted the testimony of Officer Valle as an expert on "gangs, their structure and activities, particularly as related to West Oakland." Valle identified the neighborhood where the shooting took place as the turf of the Acorn gang, a rival of the Ghost Town gang. He explained those two gangs were involved in an "extremely violent and bloody feud." Officer Valle testified defendant, Williams and Jones were affiliated with the P Team subset of the Ghost Town gang, and Duder[3] was affiliated with Ghost Town. He identified Dionte Houff, also known as "Birdman," as an Acorn gang member.

Officer Valle also testified it was not important to the gangs whether innocent bystanders were killed during their feud. Shootings of innocent people, in his opinion, benefited the shooting gang because they create "a violent reputation for the gang, sending a message to the rivals that they are not to use force, or means of violence to attack them, and to send a message that . . . they are willing to shoot anybody within their turf to send a message. And at times, that sends that shock value to the gangs that are being attacked . . . ."[4] Officer Valle testified it was common for gang members or people living in gang territory to be uncooperative with police, often for fear of retaliation.

Defendant does not specify the precise evidence he claims was irrelevant, but asserts "[g]ang evidence was irrelevant in light of the prosecution's failure to prove that [he] was a member of the P-Team gang or had committed any past violent criminal acts

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[3] Duder, sometimes spelled "Dooder" in the transcript, was 13 years old at the time of the shooting.

[4] Williams's assessment of the situation, in her interview with police, was similar: "When people funk it's just like they gonna get on whoever they think that that's gonna be out there that's you know with it. Cuz it's like a lot of people in Ghost Town had died that didn't have nothing to do with nothin' they just standing in a crowd. And like you know like how you be goin' to get somebody but then you get the wrong person . . . ."

in affiliation with or for the benefit of that gang, or any other circumstance to rationally support the conclusion that [he] explicitly or impliedly knew the conduct was motivated by a retaliatory purpose on the part of P-Team." Defendant mistakes the prosecution's burden in this regard; because this case involved neither a substantive gang charge nor a street gang enhancement, the prosecution was not required to prove defendant's gang membership beyond a reasonable doubt. Nevertheless, there was sufficient evidence of defendant's gang affiliation to render the "gang testimony" relevant. Officer Valle testified defendant was affiliated with P Team, and Williams told police defendant was affiliated with P Team. Defendant does not dispute the evidence showed Williams, Jones, and Duder, who were in the car driven to the shooting, were affiliated with the P-Team/Ghost Town gang.

At oral argument, defendant's counsel maintained the gang evidence was not relevant to motive, relying on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*). In *Albarran*, the defendant was convicted of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping for carjacking, as well as gang enhancements pursuant to Penal Code section 186.22. (*Albarran*, at p. 217.) A large amount of gang evidence, "including [defendant's] gang affiliation, tattoos, gang behavior, activities [and] crimes," was admitted as relevant to motive and intent. (*Id.* at pp. 217, 219–220.) A sheriff's deputy gang expert testified to his "numerous" prior contacts with the defendant, who was a member of the "13 Kings" gang. (*Id*. at p. 220.) He "testified at length about the identities of other 13 Kings members, the wide variety of crimes they had committed and the numerous contacts between the various gang members (other than [the defendant]) and the police. He described a specific threat 13 Kings had made in their graffiti to kill police officers. The jury heard references to the Mexican Mafia both during the prosecutor's opening argument and in [the expert's] testimony." (*Id*. at pp. 227–228, fn. omitted.) The expert further testified "how gang members gain respect by committing crimes and intimidating people." (*Id*. at p. 221.)

The shooting occurred at a private birthday party, with "no evidence the shooters announced their presence or purpose—before, during or after the shooting." (*Albarran*,

supra, 149 Cal.App.4th at pp. 220, 227.) The gang expert testified "he was told there were members of another gang" at the home where the shooting occurred, and opined the offenses were gang-related because "there were two shooters involved, and the crime would intimidate people." (*Id.* at pp. 227–228.) The Court of Appeal held the gang evidence was improperly admitted to show motive, concluding "[t]here is nothing inherent in the facts of the shooting to suggest any specific gang motive . . . the only evidence to support . . . motive is the fact of [the defendant's] gang affiliation." (*Id*. at p. 227, fn. omitted.)

In contrast, the circumstances of the crime in this case did suggest a gang motive. Defendant, an affiliate of Ghost Town, while wearing a memorial T-shirt commemorating a slain gang member, was driving through rival gang territory with other affiliates of the Ghost Town gang. His codefendant Jones saw a man he thought to be a member of a rival gang, Dionte Houff, with whom he had a previous conflict. That man, however, turned out to be Johnson.

Officer Valles's testimony was thus highly relevant because it provided evidence of motive for the otherwise unexplainable killing. And, his testimony was relevant to provide background and context, explaining the structure, activities, territories and rivalries of gangs in Oakland at the time of the killing.

Defendant also maintains the evidence should have been excluded under section 352, claiming even if the "gang evidence" was relevant, its relevance was "heavily outweighed by the extreme emotional bias [it] evoked against defendant." Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." " ' "Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citation.]' [Citation.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.)

"It is important to keep in mind what the concept of 'undue prejudice' means in the context of section 352. ' "Prejudice" as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" [Citation.] [¶] 'The prejudice that section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations]. 'Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

The court undertook a careful weighing before admitting the gang testimony. After conducting a section 402 hearing at which Officer Valle testified, the court stated: "I do find that there is some prejudice as to admission of the gang evidence, in that, . . . the jury could take from that gang membership, such that the membership in a violent street gang might, to a jury, show that the defendants are bad guys, and by that reason alone, are more likely to have committed the crime. [¶] So those are factors weighing towards prejudice and confusion, pursuant to 352. [¶] However, I feel that the evidence is highly relevant to show motive, to provide the 'why' the killing of James Johnson occurred; that is, that it was a retaliation type of killing, shown by the fact that the group

would not have been in the Acorn area at [personal] peril unless to conduct a violent act. [¶] Also, the evidence is highly relevant, in and of itself, to corroborate the expected testimony of Laquisha Williams. [¶] So I'm balancing all of the evidence, taking into consideration the written authorities and the testimony of Officer Valle that I heard today. [¶] I feel that the relevance of the evidence substantially outweighs prejudice. [¶] I do believe a curative instruction, if desired by the defense, can be fashioned, to the effect that membership in a gang, in and of itself, does not prove the crime charged." We cannot say this ruling was an abuse of discretion.

Even assuming it was error to admit the gang evidence, it was harmless.[5] Defendant acknowledged "taking a human life" in his "Dear Lord" letters, and prayed for acquittal. Perry witnessed the shooting and identified defendant as the shooter. Williams told police defendant got out of her car at Mohr 1 on the day of the shooting, and returned carrying a gun after she heard shots. Williams also identified defendant in still photos from the surveillance video. Moreover, the gang evidence was also used to attack the credibility of the prosecution witnesses Perry and Williams, who were affiliated with rival gangs. In sum, there was no reasonable probability that there would have been a result more favorable to defendant in the absence of Officer Valle's testimony.

Exclusion of Evidence Regarding Williams's Credibility

Defendant maintains the court erred in excluding evidence Williams "fabricated evidence to incriminate her husband" in statements to police about an unrelated murder with which her husband was charged. The court excluded the evidence under section 352.

Counsel for codefendant Jones filed a motion seeking to question Williams about her testimony in the trial of her husband for the murder of her brother, which was

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[5] Defendant claims admission of this evidence denied him his due process rights, necessitating review under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.) "[T]he admission of evidence results in a due process violation only if it renders the trial fundamentally unfair," a claim defendant has not made. (*People v. Cowan* (2010) 50 Cal.4th 401, 463–464.) The Attorney General asserts there was no prejudice under either the *Chapman* or *People v. Watson* (1956) 46 Cal.2d 818 standards.

proceeding at the same time. She allegedly "testified as to hiding a murder weapon [and] suggesting that [her husband,] the defendant take a photo of himself in Reno, and change the date, manufacturing evidence." Williams also told police her husband was not the shooter. Defense counsel asserted "she's now saying that she told the police that story, because she was upset with her husband for having another woman, and for shooting her brother, so she was trying to fabricate evidence to incriminate him. [¶] At the trial she says: But I just made that up. Now I'm telling the truth: I did not suggest he fabricate it."

The court acknowledged the evidence was relevant to her credibility, but held "in order for the jury to make any sense whatsoever of that evidence, in the face of her denial that she lied during her testimony at those trials, [it] certainly will involve undue time and confusion, which I think does substantially outweigh its probative value."

The probative value of her inconsistent testimony in connection with a different trial was limited because Williams's credibility was already severely undermined in a variety of ways. Her testimony at this trial contradicted important aspects of the statement she made to police after the incident. At trial, she claimed to have "fabricated a little bit" in her statement to police. She was also impeached with three felony convictions. Additionally, she testified she used drugs and alcohol, and when she was under the influence had a difficult time remembering because she also had "other personal issues, on top of the drugs." She also readily acknowledged her lack of truthfulness. At trial, she was asked "[D]o you think it's fair to say that this statement is true: That you are willing to lie often to get what you want." Williams responded "Yes."

Given the cumulative evidence Williams was untruthful and willing to lie to get what she wanted, the confusion likely to result from the proffered evidence of her further untruthfulness in an unrelated proceeding, and the undue time presenting this evidence would take, the trial court did not abuse its discretion in excluding the evidence.[6]

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[6] Defendant asserts exclusion of the evidence to impeach Williams's credibility violated his constitutional rights to due process and to present a defense. " ' "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the

Constitutionality of Defendant's Sentence

Defendant claims his total sentence of 50 years to life was a de facto life sentence without possibility of parole (LWOP) which violated his Eighth Amendment rights because "it was imposed with no consideration of [his] youth and attendant factors" set forth in *Miller v. Alabama* (2012) ___U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*).[7] The Attorney General asserts the 50-year-to-life sentence is not a de facto LWOP because defendant's life expectancy is greater than 66 years, the age at which he would be eligible for parole. Even if the sentence is considered a de facto LWOP, the Attorney General maintains any need for resentencing has been eliminated by the recent enactment of Penal Code section 3051, which assertedly cured any constitutional infirmity.

In *Graham v. Florida* (2010) 560 U.S. 48, 74–75 (*Graham*), the court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of a nonhomicide offense to life imprisonment without the possibility of parole. In *Miller*, *supra*, __ U.S. ___ at p. __ [132 S.Ct. at p. 2464], the court further expanded the scope of the protection afforded juveniles, holding that even in homicide cases a mandatory sentence of life in prison without the possibility of parole imposed on a defendant who was under the age of 18 at the time of his or her crime violates the Eighth Amendment. The court explained that the Eighth Amendment does not necessarily foreclose a sentence of life without the possibility of parole on " 'the rare juvenile offender whose crime reflects irreparable corruption' " (*Miller*, at p. 2469), but does require that prior to

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accused's right to present a defense." ' [Citation.]" (*People v. Lucas* (2014) 60 Cal.4th 153, 270–271.) He also maintains the cumulative effect of the claimed evidentiary errors resulted in reversible error. Because we find no error in the evidentiary rulings, these claims fail.

[7] The *Miller* opinion sets forth a list of factors related to the age of a juvenile offender that the trial court must consider before imposing an LWOP sentence, including "immaturity, impetuosity, and failure to appreciate risks and consequences"; whether "the family and home environment that surrounds" the juvenile is "brutal and dysfunctional"; "the way familial and peer pressures may have affected" the juvenile; and "the possibility of rehabilitation." (*Miller, supra,* __U.S. __ at p. __ [132 S.Ct. at p. 2468].)

imposing such a sentence, the court "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (*Ibid.*) The court explained, "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Id.* at p. 2468.)

Following *Miller*, the California Supreme Court held in *People v. Caballero* (2012) 55 Cal.4th 262, that *Miller* also applied when a juvenile was sentenced to a term that was the functional equivalent of an LWOP. The court held "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*People v. Caballero, supra,* 55 Cal.4th at p. 268.)

California appellate courts have relied on *Miller* on a number of occasions in reversing de facto LWOP sentences imposed on juvenile offenders. For example, in *People v. Argeta* (2012) 210 Cal.App.4th 1478, the court held that the Eighth Amendment precluded sentencing a defendant convicted on an aiding and abetting theory of committing murder at the age of 15 to an aggregate minimum sentence of 100 years, which was concededly a de facto LWOP. In *People v. Lewis* (2013) 222 Cal.App.4th

108, Division Five of this court held that a prison sentence totaling 115 years to life for three sexual assaults and a murder was a de facto LWOP, and the juvenile defendant therefore had to be resentenced in light of *Miller*. The court directed the trial court to impose a sentence that would result in a parole eligibility date within the defendant's expected lifetime, unless the trial court found that the defendant's "offenses reflect[ed] his irreparable corruption within the meaning of *Miller*." (*People v. Lewis*, at pp. 117–123.) The issue of whether both a 77-years-to-life sentence and a 50-years-to-life sentence for a juvenile are the functional equivalent of LWOP sentences is currently before the California Supreme Court. (*In re Alatriste*, review granted Feb. 19, 2014, S214652 [77 years to life]; *In re Bonilla*, review granted Feb. 19, 2014, S214960 [50 years to life].)

Respondent claims the sentence imposed was not a de facto LWOP because "the trial court found as a factual matter that 'under present mortality rates,' [defendant] could be 'expected to live substantially beyond that minimum parole time" of age 66. At sentencing in July 2012, defense counsel raised the Eighth Amendment issue, referencing *Miller* which had been decided about two weeks prior to the hearing.[8] The court rejected that claim, stating "defendant in this case will be eligible for parole after a minimum of 50 years. And under present mortality rates, he can be expected to live substantially beyond that minimum parole time, and consequently, I would find it not to be cruel or unusual punishment."

The record, however, contains no evidence of "present mortality rates." As one commentator has noted, mortality rates may differ based on gender, race, socioeconomic factors and incarceration. (Cummings, Adele, et al., *There is no Meaningful Opportunity in Meaningless Data: Why It is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences* (2014) 18 U.C. Davis J. Juv. L. & Policy 267, 279–285.) Without any

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[8] *Miller* was issued on June 25, 2012. (*Miller*, *supra*, __U.S.__ at p. __ [132 S.Ct. 2455].) *Caballero*, which held sentencing a juvenile offender to a de facto LWOP sentence violated the Eighth Amendment, was decided about two weeks after the hearing, on August 16, 2012. (*Caballero*, *supra*, 55 Cal.4th 262.)

evidence in the record, we cannot conclude a sentence which provides for a minimum age for chance of parole at 66 years is not a de facto LWOP.

The Attorney General next maintains that even if the sentence is considered a de facto LWOP, any need for resentencing has been eliminated by the recent enactment of Penal Code section 3051.[9] The Legislature responded to our Supreme Court's suggestion in *Caballero* to enact legislation establishing a parole eligibility mechanism providing juvenile offenders who are committed to state prison with an opportunity for release. (See Pen. Code, § 3051, Stats. 2013, ch. 312, § 4 (Sen. Bill No. 260 (2013–2014 Reg. Sess.).) Section 3051 provides for a youth offender parole hearing in certain circumstances: "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . ." (Pen. Code, § 3051, subd. (b)(3).)

In *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*), decided after the opening and respondent's briefs were filed in this case, our Supreme Court considered an analogous statute; Penal Code section 1170, subdivision (d)(2). That section provides for the possibility of a resentencing hearing for juvenile offenders convicted of homicide and committed to an LWOP term pursuant to Penal Code section 190.5, subdivision (b).[10] "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing." (Pen. Code, § 1170, subd. (d)(2)(A)(i).)

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[9] The issue is currently before the California Supreme Court in *In re Alatriste* (S214652) and *In re Bonilla* (S214960), review granted February 19, 2014.

[10] Penal Code section 190.5 provides the penalty for 16-year-old or 17-year-old juveniles who commit special circumstance murder "shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

Prior to *Gutierrez*, section 190.5 had been construed as "creating a presumption in favor of life without parole as the appropriate penalty for juveniles convicted of special circumstances murder." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1360.) The *Gutierrez* court held that in order to pass constitutional muster, section 190.5, subdivision (b) must be read to permit the sentencing judge to impose either LWOP or 25 years to life, in the court's discretion, with no presumption in favor of an LWOP sentence. (*Gutierrez*, at pp. 1360, 1386–1387.) *Gutierrez* further held "*Miller*[, *supra*, __U.S. __ at p. __ [132 S.Ct. 2455]] requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Id.* at p. 1361)

The Attorney General in *Gutierrez* maintained the recent enactment of Penal Code section 1170, subdivision (d)(2), a statute analogous to section 3051, eliminated any constitutional problems arising from construction of section 190.5, subdivision (b) to include a presumption in favor of an LWOP sentence. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1384.) *Gutierrez* rejected that claim, holding "*Miller* requires sentencing courts to undertake a careful individualized inquiry *before* imposing life without parole on juvenile homicide offenders. [Citation.]" (*Id*. at p. 1382, italics added, citing *Miller*, *supra*, __ U.S. __ at p. __ [132 S.Ct. at pp. 2468–2469].) As the *Gutierrez* court reasoned, "it is doubtful that the potential to recall a[n] [LWOP] sentence based on a future demonstration of rehabilitation can make such a sentence any more valid than when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous." (*Gutierrez*, at pp. 1386–1387.) Rather, the court interpreted *Miller* as requiring that "the sentencing authority must address this risk of error by considering how children are different and how those differences counsel against a sentence of life without parole '*before* imposing a particular penalty.' [Citation.]" (*Gutierrez*, at p. 1387.) Thus, the court held the requirement that trial courts conduct an individualized inquiry into the *Miller* factors before imposing an LWOP

sentence on a juvenile offender is not obviated by section 1170, subdivision (d)(2). (*Gutierrez*, at p. 1387.)

Section 3051, which similarly provides for a parole hearing in the future, likewise does not assure that the trial court will address the *Miller* factors at the outset of a juvenile offender's sentencing. (See *Gutierrez*, *supra*, 58 Cal.4th at p. 1386; *Graham*, *supra*, 560 U.S. at p. 75.) As *Gutierrez* makes clear, that analysis must occur at the time of sentencing; the possibility that the defendant may be able to obtain an earlier parole hearing date in the future is not an adequate substitute. (*Gutierrez*, at pp. 1384–1387.) Accordingly, we conclude that defendant must be resentenced.

DISPOSITION

Defendant's conviction is affirmed. With respect to defendant's sentence only, the judgment is vacated, and the case is remanded for resentencing in accordance with the views expressed in this opinion, as they may be clarified or limited by future opinions of the California Supreme Court in the relevant cases now pending before it.[11]

[11] Defendant has also filed a petition for writ of habeas corpus in case No. A141777 which we have denied by separate order filed this date. The deferred request for judicial notice filed in case No. A141777 is hereby granted.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.